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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review –	)	IB Docket
Reform of the International Settlements	)	No. 98-148
Policy and Associated Filing Requirements	)	
	)	
Regulation of International	)	CC Docket No. 90-337
Accounting Rates	)	

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COMMENTS OF AT&T CORP.

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SUMMARY

AT&T welcomes the Commission's review of its international settlements policies in light of recent changes in the global marketplace. AT&T agrees with the Notice that the ISP should be removed for arrangements with foreign carriers that lack market power and where foreign markets are sufficiently competitive to prevent harm to the U.S. public interest. Such a move would serve the interests of U.S. consumers and carriers by encouraging lower rates and new services.

The Commission should continue the ISP where there has been no meaningful change in competitive conditions and the existing or former foreign monopoly carrier can still whipsaw competing U.S. carriers. Reliance on non-existent or highly imperfect market forces cannot substitute for the Commission's proven regulatory policies in protecting the interests of U.S. consumers and carriers against the abuse of foreign market power. In particular, AT&T is concerned by the proposal to remove the ISP for arrangements with foreign dominant carriers on routes where ISR may be authorized by the Commission but not necessarily allowed in the foreign market.

To remove the ISP with foreign dominant carriers where U.S. carriers cannot, in practice, engage in ISR would encourage whipsaws and prevent settlement rates from being reduced below benchmarks to cost-based levels. The Commission should require instead either settlement rates at "best practice" levels, or the ability of U.S. carriers to terminate traffic in the foreign market through viable ISR arrangements.

AT&T is also concerned by the proposal to modify the Commission's flexibility policy in ways that would increase the adverse effects of the arbitrary restrictions already imposed on 25 percent and above flexibility arrangements and provide

new whipsaw opportunities to dominant foreign carriers. There is no justification for secret below-25 percent flexibility arrangements -- allowing some U.S. carriers to keep their arrangements with dominant foreign carriers on flexibility routes entirely secret -- while AT&T's arrangements for more than half its traffic on those routes would remain subject to full public disclosure and regulatory review. Because AT&T lacks market power, as the Commission found in 1996, this proposal would be harmful to competition, as demonstrated by the attached affidavit by Dr. William Lehr, and should not be adopted. For the same reason, the different treatment of above- and below-25 percent flexibility arrangements should be eliminated.

The Commission should retain its existing ISR rules and should not adopt the proposals to lift these rules entirely at some future point and to allow "limited" ISR on all routes immediately. Such an approach would do little or nothing to lower settlement rates and would merely be an invitation to one-way bypass. The present reporting safeguards remain untried, and are likely to be rendered largely ineffective by the removal of the traffic distinctions on which they depend with the removal of the ISP.

Finally, the Commission should prohibit the geographic grooming of inbound traffic in foreign carrier arrangements with the Bell Operating Companies. Unlike the 25 percent flexibility restriction, which disproportionately affects AT&T notwithstanding its lack of market power, grooming restrictions on the BOCs prevent the leveraging of their control of bottleneck facilities in the U.S. market and are necessary to prevent competitive harm.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements	)	IB Docket No. 98-148
	)	
Regulation of International Accounting Rates	)	CC Docket No. 90-337

COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its Comments in response to the Notice of Proposed Rulemaking[1] concerning the Commission's proposals to change the International Settlements Policy ("ISP") and associated rules.

AT&T welcomes the Commission's review of its international settlements policies and supports the proposals to remove the ISP with foreign carriers that lack market power and where foreign markets are sufficiently competitive to prevent harm to the public interest. The Telecommunications Act requires the removal of regulations that are "no longer necessary in the public interest as the result of meaningful competition between providers." 47 U.S.C. Sect. 161(a)(2). As the Notice describes (¶ 15), the

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1 *Notice of Proposed Rulemaking*, IB Docket No. 98-148, CC Docket No. 90-337 (rel. Aug. 6, 1998), FCC 98-190 ("Notice").

advent of competition in international telecommunications allows the modification of policies originally adopted to address the non-competitive nature of foreign markets.

The ISP should be retained with foreign dominant carriers, however, where sufficient competition does not yet exist in foreign markets to prevent harm to the public interest. The threshold tests should be whether U.S. carriers can settle traffic at best practices settlement rates or engage in viable international simple resale ("ISR").

Additionally, AT&T does not support the proposal to provide secrecy for under 25 percent flexibility arrangements while retaining public comment and review -- and a more onerous approval standard -- for the above 25 percent arrangements that disproportionately affect AT&T. The same notification and approval requirements should rather apply to all outbound flexibility arrangements.

The Commission should also maintain the existing ISR rules and prohibit grooming arrangements with the Bell Operating Companies, which would merely allow the anticompetitive leveraging of their U.S. bottlenecks.

I. THE COMMISSION SHOULD REQUIRE VIABLE ISR OPPORTUNITIES IN THE FOREIGN MARKET OR BEST PRACTICE RATES BEFORE REMOVING THE ISP FROM DOMINANT CARRIERS.

AT&T supports the proposed removal of the ISP for foreign non-dominant carriers, which is consistent with the allowance of special concessions with these carriers in the *Foreign Participation Order*, provided that the threshold question of whether a foreign carrier should be treated as non-dominant remains subject to public notice and comment.[2] Because the market power of existing and former monopolists continues unabated in most WTO markets, however, the Commission should tread cautiously in modifying the requirements of the ISP for U.S. carrier arrangements with foreign dominant carriers. In particular, it should not remove the ISP based merely on compliance with settlement rate benchmarks that remain far above cost.

While the Notice acknowledges that the removal of the ISP for foreign dominant carriers should take place only in competitive markets with low settlement rates, AT&T is concerned that the primary proposal set forth in the Notice (¶ 27) would make this judgment under flawed criteria that could leave U.S. carriers with no effective alternative means of terminating traffic in the foreign country. Specifically, the mere fact that the Commission may authorize U.S. carriers to engage in ISR to a foreign country because 50 percent of the traffic to that country is settled at benchmark settlement rates will <u>not</u> necessarily mean that the foreign country has a competitive market or that it will allow ISR arrangements. Yet, to remove the ISP where U.S. carriers cannot, in practice, engage in ISR would encourage dominant foreign carriers to engage in whipsaws and prevent settlement rates from being reduced below benchmarks to cost-based levels -- the long-standing Commission goal reaffirmed in the *International Settlement rate Order*.

The Commission should at least require the dominant carrier to have lowered settlement rates to "best practice" levels, or that U.S. carriers have the ability to

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[2] AT&T concurs that the proposed modifications of the ISP rules should apply only to WTO Member countries. (Notice, ¶17.) Non-WTO Member countries generally present greater competitive concerns and, therefore, their carriers should not be given the greater freedoms that the removal of the ISP would provide.

terminate traffic in the foreign market through viable ISR arrangements under reasonable and nondiscriminatory terms and conditions for interconnection. These are the minimum safeguards necessary to allow the removal of the ISP from U.S. carrier arrangements with dominant foreign carriers without facilitating the very types of anticompetitive behavior that the ISP was originally designed to prevent.

1. **<u>The ISP Should Be Removed for Non-Dominant Foreign Carriers.</u>**

As the Notice describes (¶ 20), foreign carriers that lack market power raise few concerns regarding potential whipsawing because U.S. carriers can respond to such conduct by corresponding with another operator. U.S. carriers corresponding with a non-dominant carrier could readily switch traffic from the whipsawing non-dominant carrier to another non-dominant carrier in the foreign market or to the dominant carrier.

The Commission already recognizes the diminished ability of foreign carriers without market power to adversely affect competition in the U.S. market by allowing special concessions with these carriers[3] and by refraining from requiring U.S. carriers affiliated with these carriers from complying with dominant carrier regulation.[4] The removal of the ISP and the associated Section 43.51 Section 64.1001 filing requirements for U.S. carrier arrangements with these carriers would be consistent with this approach. AT&T supports this proposed step and shares the hopes expressed by the

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3 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, (rel. Nov. 26, 1997), FCC 97-398 ("*Foreign Participation Order*"), ¶ 156.

4 Until 1992, all "foreign-owned" U.S. carriers were regulated as dominant on all international routes. *See Regulation of International Common Carrier Services*, 7 FCC Rcd. 7331 (1992).

Notice (¶ 9) that the removal of the ISP will result in U.S. carriers obtaining lower settlement rates with foreign non-dominant carriers.[5]

However, the threshold question of whether a foreign carrier is entitled to non-dominant treatment should continue to be determined on the public record with full opportunity for comment by interested parties. Because of the much greater significance of a foreign carrier's status as dominant or non-dominant under the proposed removal of the ISP for non-dominant carriers, all U.S. carriers should continue to receive the notification of any change in that status that is provided by those existing procedures. Moreover, the question of whether an individual carrier has market power is not always "clear cut," as the Notice acknowledges (¶ 23), and will be even less so as the market shares of former incumbents fall toward the 50 percent level.

Therefore, all interested parties should continue to have the opportunity to address whether a particular carrier should be treated as non-dominant. Interested parties should also have the ability to request the further review of this question following any subsequent mergers, acquisitions or other changes in the foreign market.

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5 Importantly, however, the de-regulation of U.S. carrier arrangements with foreign non-dominant carriers would provide no grounds for any relaxation of Commission enforcement of benchmark settlement rates with these carriers under the *International Settlement Rate Order*. U.S. carriers are required to negotiate benchmark rates with all foreign correspondents, both dominant and non-dominant, and the Commission has expressly rejected reliance "entirely on the market to reduce settlement rates on a timely basis to a more cost-based level." *International Settlement Rates*, 12 FCC Rcd. 19806, 19824 (1997) ("*International Settlement Rate Order*").

2. The Prevention of Whipsawing By Foreign Dominant Carriers Will Remain A Significant Concern After The Achievement of Benchmark Rates.

As the Commission found in the *International Settlement Rate Order* last year, "effective competitive market conditions exist in only a few countries. Monopoly conditions prevail in most."[6] Even after the entry into force of the WTO Agreement, the dominant operators in most WTO Member countries are, and will remain, monopolists. A number of WTO Member countries have opened their markets, and a few have also reduced settlement rates to levels approximating cost, but competitive conditions in most WTO Member countries differ little from those that originally required the adoption of the ISP.[7]

The Commission has long recognized the potential abuse of foreign market power to extract concessions from U.S. carriers that harm the interests of U.S. consumers. It stated sixty years ago in *Mackay Radio*:

> "To expect the [foreign] administration to play the competing [U.S.] companies against each other is simply to expect that the administration will be headed by

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6 *Id.*, at 19824.

7 As the Notice acknowledges (¶ 15), only 28 countries (of the more than 130 WTO Member countries) committed to competition on January 1, 1998 under the WTO Agreement. The Commission's August 1,1998 report *IMTS Accounting Rates of the United States, 1985-1998,* lists only 18 WTO Member countries as having more than one carrier with accounting rate arrangements with U.S. carriers, and provides further evidence of the slow pace at which competition is being established in these countries. Only 52 WTO Member countries made commitments to grant market access for international services either now or in the future, including 22 countries that made commitments that will not be effective until the year 2000 or, in many instances, until much later. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, (rel. June 4, 1997), FCC 97-142, ¶ 62. Almost half of all WTO Member countries made no market-opening commitments at all.

> good businessmen, loyal to their national interests. To rely upon companies which are bitter competitors not to make concessions to the administration which controls all outgoing radiotelegraph traffic is to provide an exceedingly tenuous basis upon which to rest public interest."[8]

The Commission specifically recognized the continued market power of dominant foreign carriers following the entry into force of the WTO Agreement by establishing a comprehensive competitive safeguards framework to govern the U.S. international services market, including revised dominant carrier regulations.[9] The Commission found that both monopolists and dominant carriers facing some competition could "engage in price and non-price discrimination against unaffiliated U.S. carriers."[10] Notably, as the Notice cautions (*id.*), "a large number of countries still have dominant

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8 *Mackay Radio and Telegraph Co. Inc.*, 2 F.C.C. 2d 592, 599 (1936), *aff'd Mackay Radio and telegraph Co. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938). The Commission reaffirmed this view in extending the uniform settlements policy from international record services to include international voice services when this market became competitive in the mid-1980's:

> "Absent the USP, operating agreements would more directly reflect the advantageous marketing positions of the PTTs. The result would be a loss of revenues to the U.S. industry, and ultimately a loss to the U.S. public. . . . To allow whipsawing of the U.S. carriers by the PTTs would be to allow those administrations to claim for themselves and their customers, to the detriment of the U.S. public, the benefits of competition among the U.S. carriers."

Implementation and Scope of the Uniform Settlements Policy for Parallel Routes, 51 Fed. Reg. 4736 (1986) (Report and Order) (¶ 24), *modified in part on recon.*, 2 FCC Rcd. 1118 (1987), *further recon.*, 3 FCC Rcd. 1614(1988).

9 *See generally, Foreign Participation Order*, Section V. These new safeguards resulted from the Commission's "fundamental premise that market power on the foreign end of a U.S. international route – if unrestrained – could be leveraged into the U.S. market to the detriment of competition and U.S. consumers." *Id.*, ¶ 149.

10 *Id.*, ¶ 227.

operators which charge U.S. carriers settlement rates that are many times the cost of terminating international traffic."[11]

Although the Notice (¶ 25) describes its proposals as lifting the ISP for all carrier arrangements only "in liberalized markets with low settlement rates," it goes on to propose removing this safeguard under a standard that offers neither adequate liberalization nor sufficiently low settlement rates to avoid potential harm to U.S. consumers and carriers. The primary proposal set forth in the Notice (¶ 27) is to remove the ISP "on routes where the Commission has already authorized ISR." Contrary to the arguments put forward in support of this proposal, however, there is no "significantly reduced threat" of competitive injury from removal of the ISP in such circumstances when, as the Notice describes (*id.*), ISR may be authorized by the Commission merely "where 50 percent of the traffic on the route is settled at or below benchmark rates." The Notice thus effectively proposes to remove the ISP for dominant foreign carriers that provide benchmark rates.

The Notice (¶ 27) acknowledges that "whipsawing by a foreign carrier that has already agreed to settle traffic at or below benchmarks" would adversely affect U.S. carriers and consumers.[12] A significant objective of the foreign dominant carrier engaging

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11 *See also, International Settlement Rate Order*, 12 FCC Rcd. at 19820 ("inflated settlement rates 'in effect impose [] monopoly pricing on customers located in open markets' such as the United States").

12 As the Notice observes (¶ 27, n.36), this behavior could take a variety of forms in addition to playing U.S. carriers off against each other to coerce acceptance of arrangements that raise settlement rates or outpayments. In addition to refusing to lower settlement rates, the dominant carrier would likely seek to raise U.S.

(Footnote continued on next page)

such behavior would be to prevent reductions in settlement rates below benchmark levels, which, particularly in middle and lower income countries, are more than twice the Commission's most conservative estimate of costs ($0.09). This would frustrate the achievement of "settlement rates that reflect incremental costs" to which the Commission has emphasized that it is "still committed ultimately to achieving" beyond benchmark rates.[13] Thus, if the Commission allowed the removal of the ISP for all carriers in WTO countries providing benchmark rates, it would reduce the prospects of achieving lower, cost-based settlement rates below the benchmarks with the monopoly carriers that continue to control most of these markets and it would lengthen the period required to achieve these rates in other markets.

Because the Notice fails to take full account of the adverse impact of such whipsaw behavior on the prospects of lowering rates below benchmarks following the removal of the ISP, it mistakenly contends that any such effects would be "outweighed by the pro-competitive effect that removing the ISP will have on the U.S. international services market." However, the removal of the ISP from arrangements with dominant foreign carriers in markets where U.S. carriers have no alternative means to terminate

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outpayments (and U.S. carrier costs) through lower termination costs in the U.S., such as by "requiring U.S. carriers to agree to a non-50/50 split in the accounting rate." (Notice, ¶ 27, n.36) Moreover, there are myriad ways in which a foreign carriers may lower the inbound traffic termination costs of favored U.S. correspondents and raise those of favored correspondents, such as by sending the favored carrier higher proportions of non-peak hour calls, more valuable operator-handled calls, or calls terminating in the U.S. over short distances.

13 *International Settlement Rate Order*, 12 FCC Rcd. at 19827.

traffic is unlikely to encourage agreements to lower rates with U.S. carriers. Unless U.S. carriers can bypass the foreign bottleneck and terminate traffic in the foreign market under viable ISR arrangements, or unless the foreign dominant carrier has already lowered settlement rates to best practice levels, the removal of the non-discrimination requirements of the ISP is much more likely to lead to accommodation and whipsaws than to more aggressive negotiating by U.S. carriers.[14]

Where U.S. carriers can settle traffic at best practices rates, any potential adverse effect on the public interest from a whipsaw is greatly diminished. Best practice settlement rates provide a reasonable surrogate for the cost-based rates that remove unreasonable profits from the foreign carrier's control of termination facilities. Alternatively, the ability to obtain viable ISR arrangements in the foreign market provides U.S. carriers with another means of terminating international traffic that bypasses the settlements process, impedes any attempted whipsaw and continues to exert competitive pressure to lower settlement rates below benchmark levels. The presence of either or both of these conditions in the foreign market would greatly diminish the public interest harm that may otherwise result from the removal of the ISP. These are accordingly the

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[14] By establishing enforceable benchmark rates last year, the Commission recognized that negotiations by U.S. carriers, by themselves, are insufficient to obtain lower settlement rates with dominant foreign carriers. AT&T, which has negotiated long and hard with foreign carriers for lower settlement rates, fully agrees with this judgment. Commission policies, in the form of the ISP and now the benchmark rates established by the *International Settlement Rate Order*, provide critical reinforcement for the efforts of U.S. carriers.

minimum criteria that should be required before the ISP is removed from U.S. carrier arrangements with foreign dominant carriers.[15]

3. **Commission Authorization of ISR Would Not Support Removal of the ISP Without the Existence of Viable ISR Opportunities in the Foreign Market.**

The viable ISR opportunities that should be required in foreign markets before the ISP is removed should require much more than the mere authorization of these services by the Commission. Although the Notice (¶ 26, n 24) is correct in highlighting the ability to bypass the foreign international carrier that ISR provides, it overlooks a critical point regarding the nature of prior Commission ISR authorizations. Specifically, where ISR has been authorized because 50 percent or more of U.S. traffic is settled at or below benchmark rates (such as Denmark, the Netherlands, Germany, France and Japan), there is no necessary relationship to the fact that these countries have also allowed "U.S. carriers [] the ability to interconnect directly with the local operator, rather than relying on a traditional correspondent relationship with the foreign international carrier." (*Id.*)

In short, it is quite possible under this standard that the Commission could authorize U.S. carriers to engage in ISR to a country that prohibits these services -- particularly when benchmark rates are obtained with non-liberalized countries. This situation would have serious adverse consequences for U.S. consumers and carriers if the

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[15] Maintenance of the ISP with foreign dominant carriers, except where U.S. carriers have the ability to terminate traffic at best practices settlement rates or where they can clearly engage in ISR, is also required to protect U.S. carriers against collusive whipsaw arrangements in foreign markets following the removal of the ISP for arrangements with non-dominant carriers. Otherwise, U.S. carriers would have no alternative means of terminating traffic if such a carrier then sought to exert a whipsaw in collusion with other carriers.

Commission's ISR authorization also triggered the removal of the ISP, which is a significantly greater step.[16]

The potential pitfalls of such an approach are illustrated by Mexico, which resolutely refuses to honor its WTO commitment to allow ISR services.[17] Yet, under the proposal described by the Notice, the ISP will be removed for all U.S. carrier arrangements with Mexico once U.S. carriers obtain the $0.19 benchmark rate with Mexico, as the Commission requires by January 1, 2000. Enforcement of Mexico's WTO obligation to allow ISR could take much longer under WTO dispute procedures, particularly as Mexico would be allowed up to 15 months to implement changes in its laws and regulations after an adverse WTO decision, during which there is no right to retaliation or other compensation.[18]

Similar problems would occur with other countries not authorizing ISR, however proper or improper may be their failure to do so. For example, Israel's WTO

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[16] Although it is already possible that the Commission could authorize ISR to a market that does not allow these services, this situation would not adversely affect consumers because traffic on the route would simply remain subject to the ISP. If the foreign carrier then attempted to use the Commission's authorization to terminate its U.S.-bound traffic at lower rates (*i.e.*, to engage in one-way bypass), it would potentially trigger the market distortion thresholds established by the *Foreign Participation Order*. The removal of the ISP, however, would make this ISR market distortion safeguard unworkable, as demonstrated below in Section III.

[17] *See* World Trade Organization, Mexico, Schedule of Specific Commitments, Supplement 2, GATS/SC/56/Suppl.2, Apr. 11, 1997.

[18] *See* WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts. 4, 6, 20, 21, House Document 103-316, Vol. 1, 103d Cong., 2d Sess. (Sept. 27, 1994), 1654.

commitments state that "International simple resale is not permitted,"[19] but the Commission would nonetheless remove the ISP once U.S. carriers obtain benchmark rates on this route, as they are required to do by January 1, 1999.

The Commission must also look beyond whether "the foreign market permits U.S. carriers to provide service via ISR," which is the alternative ISR standard proposed by the Notice (¶ 29). The fact that U.S. carriers may have the legal right to provide ISR services in a foreign country would provide no practical assistance in countering whipsaw behavior by the foreign dominant carrier following the removal of the ISP if traffic could not be terminated through ISR under reasonable terms and conditions.

For example, the International Bureau found only last month that Chile's theoretically "open" market for ISR imposes discriminatory access charges on international calls terminating in Chile.[20] Unreasonably high interconnection charges, whether imposed on a one-way inbound basis like Chile, or on all international calls, would greatly limit the utility of ISR to U.S. carriers.

A further example of how the alternative ISR standard proposed by the Notice could be abused is provided by the ISR policy initially proposed last year by Japan, which would have subjected this traffic to settlements payments and proportionate return,

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19 *See* World Trade Organization, Israel, Schedule of Specific Commitments, Supplement 1, GATS/SC/44/Suppl.1, Apr. 11, 1997.

20 *Americatel Corp., et al.*, Order and Authorization (rel. Aug. 7, 1998), ¶ 4 (finding that Chile does not meet equivalency requirements for this reason).

thus eliminating all the benefits of ISR.[21] Although Japan did not subsequently implement these proposals, they vividly demonstrate why an ISR standard that failed to look beyond the existence of the bare legal right to terminate ISR services in the foreign market before removing the ISP for dominant carriers would not ensure the existence of meaningful alternative termination opportunities for U.S. carriers.

At a minimum, the Commission should require the presence of the *de jure* and interconnection prongs of the equivalency test in making this judgment. In addition to the legal ability to terminate switched services over international private lines in the foreign market, this would ensure the existence of "reasonable and nondiscriminatory charges, terms and conditions" for the interconnection of ISR services.[22] As the Commission has repeatedly found in its decisions applying the equivalency test, the availability of reasonable and nondiscriminatory terms and conditions for interconnection in the foreign market is absolutely necessary before U.S. carriers can engage in ISR on a viable basis.[23] This bedrock requirement should be retained as a threshold condition here to ensure the existence of meaningful ISR origination and termination opportunities on the route before U.S. carriers lose the protections of the ISP for their arrangements with

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[21] Proposed Policy on the Liberalization of Usage of International Private Leased Circuit with Interconnection to the Public Switched Network, Ministry of Posts and Telecommunications, Japan, June 8, 1997.

[22] *See, e.g., KPN US Inc.*, File No. ITC-97-382, Order, Authorization and certificate (rel. Jan. 30, 1998), ¶ 9; *Telecom New Zealand Limited*, 13 FCC Rcd. 7858, 7859 (1997).

[23] *See, e.g., Cable & Wireless Inc.*, 12 FCC Rcd. 21692 (1997) (Australia); *ACC Global Corp.*, 9 FCC Rcd. 6240 (1994) (UK).

foreign dominant carriers.[24]

4. The Scope of the No Special Concessions Rule Should Be Clearly Defined Following the Removal of the ISP.

AT&T supports the retention of the No Special Concessions rule for operating agreements, interconnection of international facilities, private line provisioning and maintenance and quality of service following any removal of the ISP for arrangements with dominant carriers, as proposed by the Notice (¶¶ 40-41). However, any application of the No Special Concessions rule to the areas presently covered by the ISP would merely reintroduce the same requirements under a different label.

Thus, just as flexibility arrangements are an established exception to the No Special Concessions rule, the removal of the ISP should preclude the application of the No Special Concessions rule to "the settlement of international traffic and allocation of return traffic," (Notice, ¶ 40), unless the Commission is to take away with one hand what it gives with the other. For the same reason, the Notice properly suggests (¶ 41) that the No Special Concessions rule does not apply "to the terms and conditions under which traffic is settled, including allocation of return traffic" on ISR routes. To avoid introducing complexity that would impede rather than promote competition, the Commission should address potential anticompetitive concerns by retaining the ISP for arrangements with

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24 There would be no merit to any claim that the use of such a standard would be contrary to the WTO obligations of the U.S. USTR emphasized in its Comments filed in the *Foreign Participation* proceeding that the Commission may legitimately take account of foreign market conditions, including "problems with interconnection for the provision of international services" in evaluating competitive effects. Comments of the U.S. Trade Representative, IB Docket No. 97-142, filed Jul. 9, 1997, at 3.

foreign dominant carriers where threshold requirements for viable ISR or best practice rates are not fulfilled.[25]

II. THE PROPOSED FLEXIBILITY MODIFICATIONS WOULD ADVERSELY AFFECT AT&T AND ENCOURAGE WHIPSAWS TO PREVENT THE ENFORCEMENT OF BENCHMARK RATES.

AT&T opposes the proposal (Notice, ¶ 33) to modify the Commission's flexibility policy by allowing carriers to seek authorization for below 25 percent alternative settlement arrangements without disclosing the terms and conditions of the agreement or identifying the foreign correspondent. The proposal would unfairly benefit smaller U.S. carriers and encourage whipsaws to raise U.S. settlement outpayments and to prevent U.S. carriers from seeking enforcement of the Commission's benchmark settlement rates.

The proposal would adversely impact AT&T, which is already disadvantaged on these routes because flexibility arrangements affecting more than 25 percent of the inbound or outbound traffic (a) entail more onerous filing arrangements, and (b) must not contain "unreasonably discriminatory" terms and conditions. AT&T lacks market power, as the Commission found in 1996, but is subject to these restrictions -- and the resulting unit cost disadvantage -- because of its market shares above 25 percent on virtually all routes. In contrast, some U.S. carriers are free of these restrictions on all

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[25] AT&T supports the proposal (Notice, ¶ 48) to provide public notice of accounting rate filings by placing this information on the Commission's web site, which would provide this information in a more efficient, less burdensome fashion than by continuing to require service on other carriers or by issuing a public notice. However, AT&T supports the retention of accounting rate notification procedures. (¶ 47.) Although these procedures have not been widely used in the past, partly because of the retroactive nature of many accounting rate changes, there appears to be no compelling reason to preclude their potential use by more carriers in the future.

of their traffic.

The Notice would increase this adverse impact by removing filing obligations only for flexibility arrangements under 25 percent -- ensuring that AT&T will be required to disclose the terms and conditions of its arrangements with dominant carriers in multi-carrier WTO markets on more than half its traffic, while most other U.S. carriers are allowed to make secret arrangements for all their traffic to these markets.

As stated by Dr. William Lehr in the attached affidavit (p. 4), "[a]pplying asymmetric regulatory constraints to a subset of carriers that do not possess market power in anticompetitive. It distorts competition among the remaining participants without market power and strengthens the position of those that actually possess such power." He concludes that the likely result is diminished competition, higher consumer prices and reduced pressure to lower settlement rates to cost-based levels.[26] Lehr Aff. at 8.

Whipsaw strategies by dominant foreign carriers are also encouraged if some of the U.S. carriers are able to enter into secret arrangements with dominant foreign carriers in multi-carrier WTO markets for all their traffic. Foreign carriers with high settlement rates and no effective termination alternatives in their markets will engage in this misconduct to keep U.S.-outbound settlement rates high and to settle U.S.-inbound traffic with the lowest bidder. A key objective will be to prevent U.S. carriers from seeking enforcement of the benchmark rates.

AT&T should be subject to the same disclosure or non-disclosure requirements as its competitors. The 25 percent threshold should be removed, for the

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[26] The affidavit by Dr. William Lehr is Attachment 1 hereto.

reasons originally set forth in its March 1997 Petition for Reconsideration of the *Flexibility Order*, and the further unfair handicap on AT&T proposed by PBCom and NYNEX should be rejected.

The Commission should also review the need for flexibility arrangements at all if it modifies the ISP rules for all non-dominant carriers and for all carriers in truly competitive markets. The removal of the ISP in these circumstances would largely achieve the flexibility originally sought in adopting the original *Flexibility Order* in 1996. The major beneficiaries of further departures from the ISP are likely to be foreign dominant carriers with high settlement rates rather than U.S. consumers.

1. AT&T Would Be Unfairly Disadvantaged By Removal of the Under-25 Percent Filing Requirement.

The Commission now allows flexible arrangements in all WTO markets, provided they have "more than one" facilities-based carrier with "the ability to terminate traffic and serve existing customers in the foreign market."[27] Accordingly, the proposal to remove existing filing requirements for under 25 percent flexibility arrangements would, in effect, remove Commission regulation entirely from some U.S. carrier arrangements with dominant non-affiliated carriers in WTO markets with more than one carrier.[28]

The removal of the below-25 per cent filing requirement would adversely affect AT&T, by virtue of its market shares of approximately twice this level on virtually

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27 *Foreign Participation Order*, ¶ 307.

28 As the Notice observes (¶ 39), the implementation of the other ISP modification proposals would limit the effect of Commission's flexibility policies to arrangements

(Footnote continued on next page)

all routes to multi-carrier WTO markets. AT&T already faces a significant cost disadvantage because of its inability to negotiate flexibility arrangements for all its traffic on the same terms as its U.S. competitors. If most other U.S. carriers are also allowed secret arrangements for all their traffic on these routes -- as would be the effect of the proposal [29]-- AT&T would be harmed to an even greater degree.

Unlike the carriers with secret arrangements, AT&T would be (a) required to reveal the settlement rates paid on more than half its traffic on virtually all these routes, (b) prevented from changing the settlement rates paid on more than half its traffic until expiration of the time periods required under the Commission's accounting rate modification or public notice procedures, and (c) potentially subject to further delay in implementation of those rate changes as the result of challenges under those procedures by other U.S. carriers.

As demonstrated by Dr. Lehr, these restrictions would "reduce[] [AT&T's] ability to negotiate efficient settlement agreements. A foreign carrier would find it more advantageous to negotiate with competitors who do not face the same public disclosure and non-discrimination obligations imposed on AT&T." Lehr. Aff. at 7. Foreign carriers will also have "an increased incentive to negotiate a higher settlement rate on the majority

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with foreign carriers with market power and with settlement rates above the benchmark level.

[29] Most other U.S. carriers have market shares under 25 percent on all routes to multi-carrier WTO markets. WorldCom/MCI would also exceed this level on these routes, but for smaller proportions of traffic generally than AT&T.

of AT&T's traffic that is subject to disclosure as a signal to other potential negotiating partners." *Id.*

These consequences would "result in higher unit costs" and increase the significant unit cost disadvantages that are already unique to AT&T because the 25 percent threshold prevents it from negotiating unrestricted flexibility arrangements for the same proportions of its traffic as its competitors.[30] *Id.* at 5-6. Because of the loss of inbound traffic that would inevitably result from the ability of foreign carriers to give that traffic secretly to the lowest U.S. bidder, AT&T would also be left with a decreased pool of inbound minutes to off-set its higher rates on outbound minutes. This would also harm competition. Where restrictions raise costs for larger firms and "favor potentially less efficient entrants," the larger carriers' "scale economies will not be fully reflected in prices." Lehr. Aff. at 7.

The Commission reached similar conclusions in removing dominant carrier regulation from AT&T's international services in 1996 because of AT&T's lack of market power. It found that "the longer tariff-filing notice periods applicable to AT&T as a dominant carrier" could have "anticompetitive consequences once AT&T is no longer dominant" because "restricting the competitiveness of the largest carrier only reduces

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30 They require that arrangements affecting 25 percent or above of the traffic on a route not be "unreasonably discriminatory," but place no such restrictions on below-25 percent arrangements. *See Regulation of International Accounting Rates*, 11 FCC Rcd. 20063 (1996) ("*Flexibility Order*").